

IN THE MATTER OF	:	BEFORE THE
BALTIMORE GAS & ELECTRIC COMPANY	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BOA Case No. 18-011C&V

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DECISION AND ORDER

On February 1, 2019, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Baltimore Gas and Electric Company (Petitioner) for a new Public Utility conditional use and two variances in an R-20 (Residential: Single) zoning district, filed pursuant to §§ 130.0.B.2 and B.5 of the Howard County Zoning Regulations (HCZR).

The Petitioner certified to compliance with the notice and posting requirements of the Howard County Code. The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure. John Gontrum, Esq., represented the Petitioner. Emily Ratzlaff, Robert Vogel, and Carl Wilson testified in support of the petition. No one appeared to testify in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

1. Emily Ratzlaff, resume
2. 1.8 - Conditional use and variance plan
3. Overall site plan, elevations of main entrance and service truck entrance, existing conditions
4. Elevations/images, main entrance and service truck fencing
5. Plan, existing and proposed fencing
6. Carl Wilson, resume

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, the Hearing Examiner finds the following facts:

1. Property Identification. The subject property is located on the north side of Ilchester Road, about 289 feet west of Talbots Landing. It is located in the 1st Election District and identified as Tax Map 0031, Parcel 557 and known as 5130 Ilchester Road (the Property).

2. Property Description. The 39.4-acre, irregular shaped Property has frontage on Ilchester Road close to Talbots Landing with a long rectangular section running in a westerly direction behind several residential properties fronting on Ilchester Road. The Property is currently improved with a Public Utility Service Center comprising an office building, fleet service buildings, outdoor storage, an electrical substation, and a Communications Tower. The 390-foot lowest elevation lies along the north lot line. From here, the elevation rises to about 470 feet to the south lot line along Ilchester Road.

3. Vicinal Properties. All vicinal properties are zoned R-20 and are each improved with single-family detached dwellings.

4. Roads. Ilchester Road has two travel lanes and a 25MPH speed limit. There are three access points to Ilchester Road from the Road: the westernmost “main” entrance/exit, a one-way entrance across from Ilchester Woods Way, and a one-way exit just past transmission lines. Technical staff reports more than 400 feet sight distances. There is no traffic data for this section of Ilchester Road.

5. Water and Sewer. The proposed development will be served by public water and sewer.

6. General Plan. The Property is designated as “Established Community” on the PlanHoward 2030 Designated Place Types. The General Plan's Transportation Map shows Ilchester Road as a Minor Collector.

7. Zoning History.

BA 09-038C. Verizon Wireless, conditional use for a commercial communications tower granted by the Hearing Examiner on February 2, 2010, subject to the following conditions: 1) The Conditional Use shall be conducted in conformance with and shall apply only to the proposed monopole and equipment compound; 2) No additional lighting is permitted other than that required by the FCC or the FAA; 3) The monopole shall be grey or a similar color, unless the FCC or the FAA requires a different color; 4) If no longer used, the communication tower shall be removed from the site within one year of the date the use ceases.

BA 91-03E. Baltimore Gas and Electric Company, Special Exception for an outdoor electric substation granted June 27, 1991, subject to the following conditions;

1. The Petitioner shall comply with all applicable laws regulations and guidelines, including, but not limited to, those pertaining to limitations on noise levels.
2. The Petitioner shall submit a Site Development Plan to the Department of Planning and Zoning within six (6) months of the date of this Order.
3. The special exception is limited to the installation and operation of the equipment as designated on the Petitioner’s Exhibit Number One, and not to any other buildings, structures, additions or uses; any other future transformers, capacitors, structures, additions, activities, or equipment not indicated on Petitioner’s Exhibit Number One are not approved and are not a part of this granted special exception.
4. The Petitioner shall comply with testimony presented and consult with the vicinal property owners to develop an agreed upon landscaping plan for the screening of the site; however, at minimum, the site shall be screened from the vicinal properties by a staggered line of evergreen trees at least six (6) feet tall to be planted and maintained for the life of the special exception along the northern and southwestern lot lines. For safety purposes, there shall be [a] break in the screening in front of the stormwater management pond, so as to create a line of sight from the office building into the stormwater management area.
5. The Petitioner shall comply with testimony presented and surround the proposed stormwater management pond with a seven (7) foot tall chain link fence topped with a [sic] one (1) foot of barbed wire; said fence shall comply with the Department of Public Works’ requirements for access to the stormwater management pond.
6. The Petitioner shall comply with testimony presented and paint the lightning masts throughout the site sky blue in color.
7. The Petitioner shall comply with testimony presented and paint the proposed facility and equipment therein a neutral, “desert tan” in color.
8. The Petitioner shall comply with testimony presented and limit the noise emanating from the facility to no louder than fifty (50) decibels at the property line.

BA 570-C. Baltimore Gas and Electric Company, Permit to enlarge an existing electric service center granted July 24, 1968

BA 189-C. Baltimore Gas and Electric Company, Permit to erect a radio tower granted May 14, 1956

BA 183-C. Baltimore Gas and Electric Company, Permit to erect an electric distribution center granted March 5, 1956

8. The Conditional Use Proposal. Petitioner is proposing to substantially upgrade the existing Public Utility Service Center by razing the site and constructing a new facility comprising a 27,994sf two-story office building, a 10,821sf two-story feet service building, a 11,284sf loading dock, three outdoor storage areas, and a service building parking area. The conditional use/variance plan is shown on pg. 7. The existing building to be razed was constructed in the 1950s and there have been no significant improvements since then. The redesign will relocate any source of noise to be isolated from abutting and vicinal properties.

As proposed, the conditional use site (CUS) features two primary programmatic use areas defined by two principal buildings located in the central portion of the Property. The first is the proposed westerly 34'-high service center and office building and affiliated employee parking. This area will be accessed from the westerly "main" ingress/egress. As seen on Exhibit 3, the two principal buildings are designed with a softer, more institutional look to ensure compatibility with the neighborhood. For this reason the fencing in this area was revised as shown on Exhibit 4 as an open "picket" fence.

The second main structure/use is the 30'8" fleet service building and related service and equipment parking. There is a dedicated and separate service ingress and egress for these service vehicles and equipment.

The two principal buildings/uses will be connected by a 26'-high, 11,284sf, covered loading dock. Three dumpsters will be located on the north side of the loading dock. To the north of the service center/office building is a dedicated area for an emergency generator and electrical equipment. To the east and behind the loading dock are two proposed 19-foot covered parking structures, which will be used in part to store BGE's "bucket" vehicles.

The primary, loading and parking structures will be surrounded by the above referenced parking lots and outdoor storage areas. The front section of the site will be enclosed by proposed 8'-high closed security gated fencing, except as noted above. The fencing in the rear portion of the site will include a combination of existing fencing and proposed 8'-high chain link fencing. All proposed fencing is shown on Exhibit 5. The conditional use plan includes a landscape plan showing the requisite perimeter and internal parking area landscaping.

The existing uses will continue on-site and include general office usage, equipment storage, and vehicular maintenance. Exterior activities to continue include loading of small and large electrical equipment onto vehicles, parking and electrical pole/equipment storage. The facility is a 24-hour operation with core business hours of 7am-3pm Monday-Friday. There are 120 employees reporting to this facility. Outdoor lighting will be motion controlled with 50% normal state when vehicles are not circulating on the Property. Only one new light pole is anticipated.

9. Requested Variances.¹ Petitioner is requesting two variances: a variance to reduce the 50-

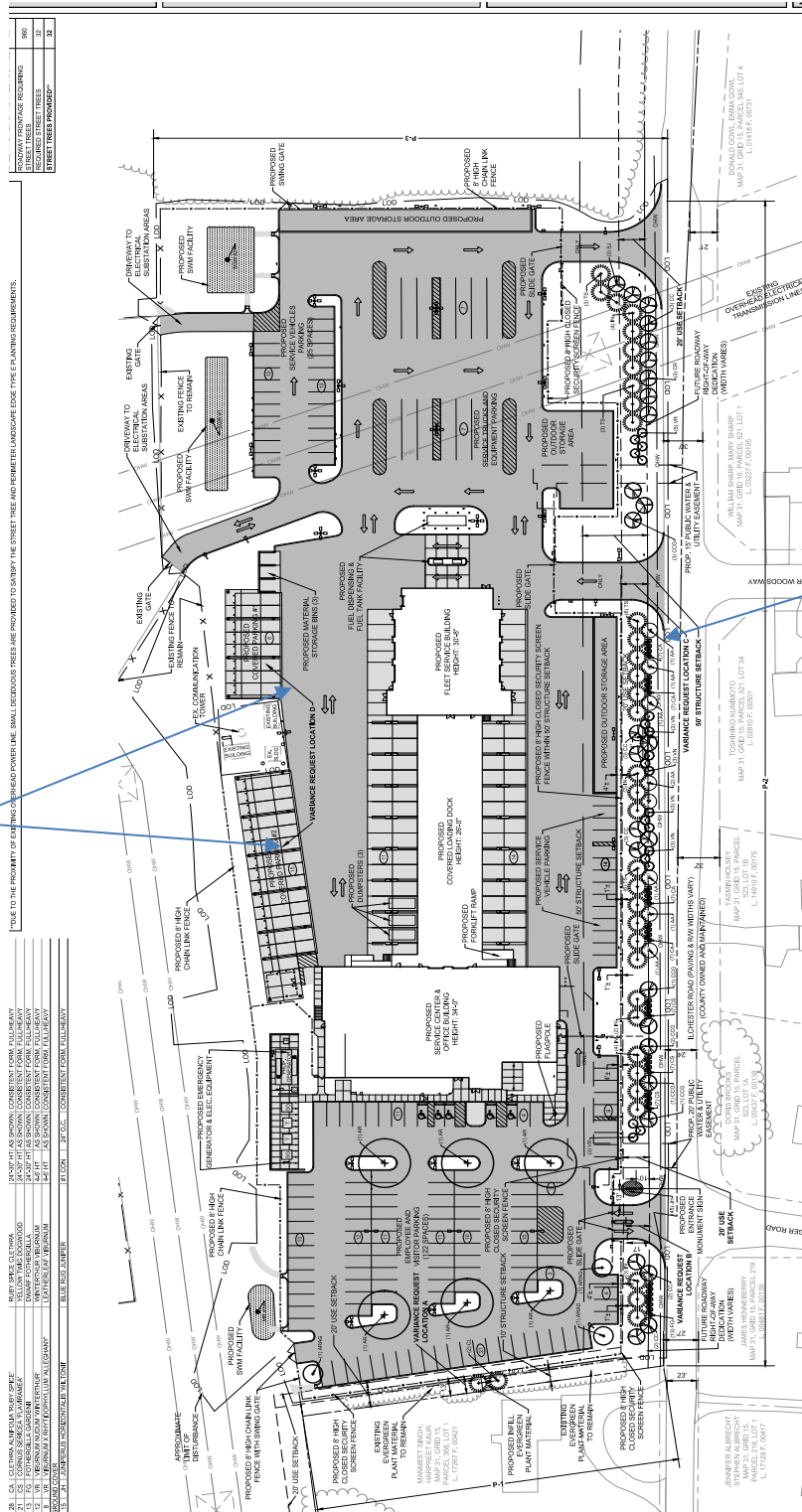
¹ The Department of Planning and Zoning determined two variance requests (for gate control equipment and a fence) submitted by Petitioner were unnecessary.

foot structure setback imposed by HCZR § 108.0.D.4.c(2) to 20 feet for eight-foot high security fencing and a variance to increase the 15 feet accessory structure maximum height limitation imposed by HCZR § 108.0.D.1.b to 19 feet for two accessory parking structures. The fencing is in the same general location as the existing fence. The increase structure height variance is for the Public Utility's "bucket" vehicles and taller equipment.

10. Emily Ratzlaff, project architect, testified about the conditional use site. Robert Vogel testified about the proposed site plan's compliance with the conditional use and variance approval standards. Carl Wilson testified there are no issues with safe ingress and egress, given the hours of operation, as employee and utility trips do not generally occur during peak traffic hours.

Variance request for 19' high accessory parking structures

Variance request for security fencing 20' from ROW



The Conditional Use and Variance Plan

CONCLUSIONS OF LAW**I. Compliance with the Specific Standards for Variances**

The standards for variances are contained in HCZR § 130.0.B.2.a. Pursuant to this section, the Hearing Examiner may grant a variance only if the Petitioner demonstrates compliance with all four variance criteria. Based upon the foregoing Findings of Fact, and for the reasons stated below, the Hearing Examiner finds the requested variances comply with §§ 130.0.B.2.a(1) through (4), and therefore may be granted.

(1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.

The first criterion for a variance is that there must be some unique physical condition of the property, e.g., irregularity of shape, narrowness, shallowness, or peculiar topography that results in a practical difficulty in complying with the particular bulk zoning regulation. This test involves a two-step process. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A “practical difficulty” is shown when the strict letter of the zoning regulation would “unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974).

With respect to the first prong of the variance test, the Maryland courts have defined

“uniqueness” thus.

In the zoning context, the ‘unique’ aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. ‘Uniqueness’ of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to characteristics as unusual architectural aspects and bearing or party walls. *North v. St. Mary’s County*, 99 Md. App. 502, 514, 638 A.2d 1175 (1994) (italics added).

In this petition, the Property is irregularly shaped. This is a unique physical condition of the Property causing practical difficulty in complying strictly with the setback regulations in accordance with HCZR § 130.B.2.a(1).

(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

The requested variances are to reduce the 50-foot structure setback imposed by HCZR § 108.O.D.4.c(2) to 20 feet for eight-foot high security fencing and to increase the 15-foot accessory structure maximum height limitation imposed by HCZR § 108.O.D.1.b to 19 feet for two accessory parking structures. The fencing is in the same general location as existing fencing. The increased structure height variance is for BGE’s “bucket” and other equipment and the proposed structures will be located some distance from area roads and neighboring residential uses and buffered by existing and proposed landscaping and the primary building. The requested variances will not alter the essential character of the neighborhood or district or impair the use of development of adjacent property. The petition complies with § 130.O.B.2.a(2).

(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

The Petitioner did not create the practical difficulties, in accordance with § 130.0.B.2.a(3).

(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

The proposed variances are for a reasonable use of the Property, in accordance with § 130.0.B.2.a(4).

II. General Criteria for Conditional Uses (§ 131.0.B)

Based upon the foregoing Findings of Fact, the Hearing Examiner concludes as follows:

1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use.

There are no PlanHoward policies directly related to Public Utility uses. The 2013 comprehensive rezoning text, including this conditional use category, implemented the General Plan.

2. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site are such that the overall intensity and scale of the use(s) are appropriate for the site.

HCZR § 131.0.B.2 is an on-site evaluation of the proposed Conditional Use. The purpose of the new conditional use plan and affiliated variance petition is to consolidate operations in a single building and increase operational efficiencies. This Public Utility service center will continue to operate at existing levels with no increase in the nature and intensity of use. Ilchester Road, a Minor Collector, continues to provide access. The Property's size is such that it can accommodate dense landscaping and woods along multiple perimeters, an indication that the size of the site can accommodate the nature and intensity of use. The nature and intensity of use,

as well as the scale of the use, and the location of streets providing access, are appropriate for the site.

3. The proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. In evaluating the proposed use under this standard, the Hearing Authority shall consider whether or not:

Unlike §§ 131.0.B.1 and 2, which concern the proposed use's harmony or compatibility with the General Plan and the on-site characteristics of the proposed use, compatibility with the neighborhood is measured under § 131.0.B.3's six "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading; (4) access; (5) impact on environmentally sensitive area, and; (6) impact on the character and significance of historic sites. These six adverse impact tests gauge the off-site effects of the proposed conditional use.

Inherent in the assessment of a proposed conditional use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment therefore accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would have adverse effects in an R-20 zoning district. The proper question is whether there are facts and circumstances showing the particular uses proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception [conditional] use irrespective of its location within the zones. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, and as conditioned, the Petitioner has met its burden of presenting sufficient evidence under HCZR § 131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a Public Utility conditional use in the applicable zoning districts.

a. The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.

There is no evidence of record regarding atypical adverse effects on vicinal properties from dust, fumes, and odors, noise, or hazards. All lighting will be appropriately located and will operate under motion controls with normal state to be 50% while vehicles are not circulating on the Property. The site is designed to locate any noise associated with routine activity away from adjoining and vicinal properties.

b. The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

Petitioner is requesting a variance from the 50-foot structure front setback to 20 feet for closed security fencing, which is partly designed as a 8-foot high picket fence for compatibility with adjoining and vicinal residential properties. The 34-foot high primary service center/loading dock/fleet service building is generally centered on the Property and meets the district primary structure maximum height requirements. It will be buffered from vicinal residences by fencing and landscaping. The requested variances for two 19-foot high accessory structures (covered parking) will not atypically affect or discourage the development and/or use of adjacent land and structures more at the subject site because of distance and their location on lower elevations,

which will minimize their appearance. Fencing, existing and proposed landscaping are also proposed. For these reasons, the Public Facility use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

HCZR § 133.0 requires 3.3 parking spaces per 1,000sf for office space and 2.0 spaces per 1,000sf motor vehicle service/repair (excluding service bays) and 3.0 spaces per service bay. The CUS shows the require 122 parking spaces, as well as 101 fleet vehicle parking spaces. The three proposed dumpsters will be located behind the loading dock to screen them from adjacent properties and Ilchester Road. Parking will be appropriately screened and buffered from surrounding areas by existing and proposed landscaping and fencing.

d. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.

The CUS shows three points of access. Carl Wilson testified the operational characteristics of the use and hours of operation will have no impact on safe ingress and egress, as employee and utility trips do not occur during peak traffic hours. There is good sight distance. There is no shared driveway access.

e. The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

There are no known environmentally sensitive areas in the vicinity.

f. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

There are no vicinal historic sites.

III. Specific Criteria for Public Utility Uses (§ 131.0.N.56)

A Conditional Use may be granted in the RC, RR, R-ED, R-20, R-12, R-SC, R-SA-8, R-H-ED, R-A-15, R-APT, R-MH, R-SI, I, R-VH, HO, HC, POR, CCT, B-1, B-2, SC, BR, PEC, PGCC, CE, TOD, CAC and TNC Districts for the following public utility uses, subject to certain conditions:

a. Permitted Uses:

- (1) Utility substations.**
- (2) Above ground pipelines.**
- (3) Pumping stations and compression stations.**
- (4) Telecommunication equipment facilities.**

Although Petitioner is not proposing these specific uses, the conditional use request is for a "Public Utility," which can reasonably encompass uses and structures supportive of the electric distribution center approved by the Board of Appeals in 1956.

b. Special Conditions:

- (1) The proposed location, design and method of operation will not have a detrimental effect on the privacy and quiet of the neighborhood and the safety of its inhabitants.**

The operation has existed for many decades at this location. The new configuration, location, design and method of operation will not change substantially. For this reason, there will be no detrimental effect on the neighborhood.

- (2) The design of proposed buildings and the landscaping treatment of the site will be in harmony with the area.**

The proposed primary structure is designed to read as an institutional use from the street. The simple covered parking structures continue some of the details of the primary structure and feature. The existing and proposed landscaping will complement the area. Even more, as Ms.

Ratzlaff testified, the proposed landscaping will not need pruning to protect the utility lines running along Ilchester Road.

(3) The Hearing Authority may prescribe appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area, including requirements for soundproofing, for the construction of fences, barriers or other safety devices, for surfacing of access driveways, for shielding of lighting, and/or for landscaping or screening.

The Hearing Examiner commented on the excellent design and operational program of the new Public Utility Use during the proceeding. This may explain why there was no community opposition to the use. For these reasons, I see no need to prescribe any conditions or safeguards beyond those proposed by Petitioner. The Petitioner is to be commended for the design.

(4) When approving a public utility use, in its discretion, the Hearing Authority may authorize future changes not requiring further Hearing Authority approval. Such changes shall be limited to the addition, relocation, or modification of foundations or equipment, or additions to existing buildings, within a fence line approved by the Hearing Authority.

For the reasons just discussed, the Hearing Examiner hereby authorizes future changes, which shall be limited to the addition, relocation, or modification of foundations or equipment, or additions to existing buildings, within the fence line approved through this decision and order.

(5) When approving a public utility use, the Hearing Authority may approve an accessory commercial communications tower to serve that use.

No accessory commercial communications tower serving the Public Utility use is proposed.

c. For a new public utility use, the use would be located on property which is not an ALPP purchased or dedicated easement property. An existing public utility is not required to comply with this criteria.

Technical staff reports the use is not located on property subject to an ALPP easement or dedicated easement property.

ORDER

Based upon the foregoing, it is this **26th day of February 2019**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the petitions of Baltimore Gas and Electric Company for a new Public Utility conditional use and two variances in an R-20 (Residential: Single) zoning district are hereby **GRANTED.**

Provided, however, that:

1. The conditional use shall be conducted in conformance with and shall apply only to the proposed Public Utility use described in the petition, depicted on Conditional Use/Variance Plan and shown on all exhibits, and not to any new structures or uses or any additions thereto.
2. The Hearing Examiner hereby authorizes future changes, which shall be limited to the addition, relocation, or modification of foundations or equipment, or additions to existing buildings, within the fence line approved through this decision and order.
3. Petitioner shall obtain all required permits.
4. Petitioner shall comply with all federal, state, and local laws and regulations.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFaivre

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing. In accordance with C.B. 51-2016, § 1 (HCC Sec. 22.902 - Computation of time), if the deadline to appeal is a Saturday, Sunday, or holiday, or if the County offices are not open, the deadline shall be extended to the end of the next open County office business day.